Pyramid Construction, Inc. *and* Carpenters District Council of Detroit and Southeastern Michigan, Wayne, Oakland, Macomb, Sanilac, St. Clair, Monroe, Washtenaw, Livingston, Genessee, Tuscola, Huron and Lapeer Counties and Vicinities of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO–CLC. Case 7–CA–31458

September 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Upon a charge filed by the Union, on January 30, 1991,[1] the General Counsel of the National Labor Relations Board issued a complaint on March 14, 1991, against Pyramid Construction, Inc., the Respondent, alleging that it has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On May 3, 1991, the General Counsel filed a Motion for Summary Judgment. On May 8, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, ''all of the allegations in the complaint shall be deemed to be admitted true and may be so found by the Board.'' Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Acting Regional Attorney for Region 7, by letter dated April 4, 1991, notified the Respondent that unless an answer was received by April 18, 1991, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

[1] An amended charge was filed by the Union on February 15, 1991.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Michigan corporation, is engaged in the building and construction business as a carpentry subcontractor at its facility in Taylor, Michigan, where it annually performs services valued in excess of $50,000, which services were performed in, and for various enterprises including Sveden House, Inc.[2] located in States other than the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

On or about October 1, 1990, Respondent entered into, and became party to, a collective-bargaining agreement with the Union with respect to the following unit of employees, which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time carpenter employees; but excluding office clerical employees, guards and supervisors as defined in the Act.

The agreement was by its terms effective until June 1, 1991. Since October 1, 1990, the Union has been the exclusive representative under Section 9(a) of the Act.

A. *Discrimination*

On or about November 12, 1990, the Respondent terminated the employment of Dennis Gustin because of his membership in, and activities on behalf of, the Union.

We find that the Respondent's conduct constitutes unlawful discrimination in regard to the hire or tenure or terms or conditions of employment in violation of Section 8(a)(3) and (1) of the Act and thereby discourages membership in a labor organization.

B. *Refusal to Bargain*

On or about November 12 and 13, 1990, the Respondent repudiated the collective-bargaining agreement with the Union. Since that time, the Respondent has failed and refused to comply with the terms of the collective-bargaining agreement, thereby causing separation of employment of all its unit employees.

We find that the Respondent's conduct constitutes an unlawful refusal to bargain with the representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

[2] Sveden House, Inc. annually has gross revenues in excess of $500,000 and purchases goods and materials valued in excess of $5000 directly from suppliers located outside the State of Michigan for use in its facilities located within the State of Michigan.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Dennis Gustin on or about November 12, 1990, because of his membership in and activities on behalf of the Union, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By repudiating and refusing to comply with the collective-bargaining agreement since on or about November 12 and 13, 1990, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Dennis Gustin, we will order the Respondent to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him with backpay to be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having unlawfully repudiated the collective-bargaining agreement, we will order the Respondent to restore and adhere to the terms and conditions of the agreement effective from October 1, 1990, to June 1, 1991, until such time as a new agreement or impasse is reached. We shall order the Respondent to make whole all employees in the unit for any loss of earnings resulting from the Respondent's conduct in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with additional amounts to be paid into employee benefit funds as provided in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979). This shall include making all employees whole for any loss of pension plan credits or benefits resulting from the Respondent's failure to implement the terms of the agreement. *Kraft Plumbing & Heating*, 252 NLRB 891 (1980).

The complaint alleges that the Respondent repudiated the contract, ''thereby causing the separation of employment of all its unit employees.'' The complaint then goes on to allege that ''[b]y the acts described above,'' the Respondent violated Section 8(a)(5). Respondent failed to file an answer and thereby admitted all of the above. In these circumstances, it may be reasonable to find that Respondent admitted that its repudiation of the contract *and the consequent separation of employees* violated Section 8(a)(5) of the Act. Further, even assuming arguendo that the separation of employees is not alleged as unlawful, it is alleged as the consequence of unlawful conduct. Clearly, the Board can and should remedy the employment consequences of unlawful conduct.

Notwithstanding the above, we shall not grant a remedy for the separated employees. The difficulty is that the complaint does not make clear whether the ''separation'' was a voluntary act by the employees or a forced termination by the Respondent, i.e., whether the employees quit because of the contract repudiation or were discharged as part and parcel of the contract repudiation. Indicative of the ''voluntary quit'' interpretation is the fact that the General Counsel does not seek reinstatement and is somewhat ambiguous as to whether he seeks a make-whole remedy for the separated employees. In light of the foregoing, and since this matter is before us on a Motion for Summary Judgment, we shall not award a remedy to the separated employees except insofar as they became reemployed in the unit.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Pyramid Construction, Inc., Taylor, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for their union membership or union activities. (b) Failing or refusing to give effect to and fully comply with its collective-bargaining agreement with Carpenters District Council of Detroit and Southeastern Michigan, Wayne, Oakland, Macomb, Sanilac, St. Clair, Monroe, Washtenaw, Livingston, Genessee, Tuscola, Huron and Lapeer Counties and Vicinities of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO–CLC.

(b) Refusing to bargain collectively with the Union concerning rates of pay, wages, hours, and other terms and conditions of employment in the following appropriate unit:

> All full-time and regular part-time carpenter employees; but excluding office clerical employees, guards and supervisors as defined in the Act.

[3] In view of the ambiguities raised by the complaint and the General Counsel's proposed remedy with respect to the separation of unit employees, Member Devaney would deny without prejudice the General Counsel's Motion for Summary Judgment concerning these aspects of the case and would remand these matters to the Regional Director for further appropriate action, if any.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Dennis Gustin immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of this decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) On request, bargain in good faith with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Restore and place in effect all terms and conditions of employment provided by the parties' collective-bargaining agreement which expired on June 1, 1991, until such time as a new agreement or impasse is reached.

(e) Make employees whole for any wages or other benefits they may have lost as a result of the Respondent's failure to abide by the collective-bargaining agreement which expired June 1, 1991, as prescribed in the Remedy section of this decision.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Taylor, Michigan, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any employee for their union membership or union activities.

WE WILL NOT fail or refuse to give effect to and fully comply with our collective-bargaining agreement with Carpenters District Council of Detroit and Southeastern Michigan, Wayne, Oakland, Macomb, Sanilac, St. Clair, Monroe, Washtenaw, Livingston, Genessee, Tuscola, Huron and Lapeer Counties and Vicinities of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO–CLC.

WE WILL NOT refuse to bargain collectively with the Union concerning rates of pay, wages, hours, and other terms and conditions of employment in the following appropriate unit:

> All full-time and regular part-time carpenter employees; but excluding office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Dennis Gustin immediate and full reinstatement to his former job or, if that job no longer exists, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge.

WE WILL notify him that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

WE WILL on request, bargain in good faith with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL restore and place in effect all terms and conditions of employment provided by the parties' collective-bargaining agreement which expired on June 1, 1991, until such time as a new agreement or impasse is reached.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

WE WILL make employees whole for any wages or other benefits they may have lost resulting from our failure to abide by the collective-bargaining agreement which expired June 1, 1991.

PYRAMID CONSTRUCTION, INC.